89- 1578

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

GARY MOORE,

Petitioner,

v.

CITY OF COSTA MESA, a municipal corporation, and THE CITY COUNCIL OF THE CITY OF COSTA MESA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. When a municipality's regulatory actions over private property fail to substantially advance legitimate governmental interests and are determined to invade the owner's property rights, can the owner state a claim for compensation under the Just Compensation Clause of the Fifth Amendment? Did the Court of Appeals err in limiting the owner's remedy to invalidation of the regulatory action?

2. Did the Court of Appeals err in dismissing plaintiff's temporary takings claim on the ground that a temporary taking is compensable only when the plaintiff alleges that substantially all economically viable use of the property was denied?

3. Is the Just Compensation Clause applicable to some regulatory takings theories but not to others? Specifically, may a claim for compensation and temporary taking be stated under either prong of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), which establishes that a land use regulation effects a taking if it fails to "substantially advance legitimate state interests, *or* denies an owner economically viable use of his land." (Emphasis added; citation omitted.)

PARTIES

The caption contains the names of all parties to this action.

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No. _____

In The

Supreme Court of the United States

October Term, 1989

GARY MOORE,

Petitioner,

v.

CITY OF COSTA MESA, a municipal corporation, and THE CITY COUNCIL OF THE CITY OF COSTA MESA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Gary A. Moore seeks review of a decision of the Ninth Circuit Court of Appeals dismissing his suit for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 886 F.2d 260 (9th Cir. 1989), and is reproduced as Appendix (App.) A. The opinion of the United States District Court for the Central

District of California is reported at 678 F. Supp. 1448 (C.D. Cal. 1987), and is reproduced as Appendix B. The unpublished opinion of the California Court of Appeal for the Fourth Appellate District, Division Three, in the preceding state court action is reproduced as Appendix E. The Judgment of the Orange County Superior Court in the preceding state court action is reproduced as Appendix F.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on September 26, 1989, and filed its order denying a petition for rehearing on January 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In this case, the Ninth Circuit has denied temporary taking damages even though there is no dispute that the

government action failed to substantially advance legitimate state interests.

The essential facts necessary for consideration of this petition are straightforward. Moore owns two adjacent lots on Wilson Street in the City of Costa Mesa. App. at A-2. The lots are zoned C1, local business district. App. at E-2. At present, there are two older houses on the lots; Moore lives in one of the houses and runs a carpet installation business out of the other.

In 1983, Moore wanted to expand his carpet business. He therefore requested zoning variances from the city for a permit to construct a commercial building on the two lots to be used as warehouse and office space. App. at E-2. The city granted the zoning variance, but with the condition that he deed to the city approximately 10% of his land so that the road could be widened in compliance with the city's master plan.[1] App. at A-2.

After unsuccessfully appealing the conditional variance to the planning commission and the city council, Moore filed an action on May 21, 1984, in state court seeking relief from the condition.[2] App. at B-2. Moore's

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[1] Wilson Street is currently 40 feet wide curb-to-curb in a 60 foot right-of-way. The city's Master Plan of Highways shows that Wilson Street will eventually be widened to a 70 foot street in an 84 foot right-of-way. App. at E-1-2.

[2] The city does not contest that Moore has exhausted all of the remedies available to him under state law. *Compare MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). *See Moore v. City of Costa Mesa*, 678 F. Supp. at 1451 n.5, *reproduced* at Appendix B-8.

state court action sought a writ of mandamus to set the condition aside, a declaration that the condition resulted in a taking without compensation, damages for inverse condemnation, and general damages and attorney's fees.[3]

Moore alleged that any burden on the adjoining street created by his proposed project was not sufficient to justify the dedication requirement demanded by the city. The state court agreed and granted mandamus and declaratory relief, finding the evidence insufficient to support any relationship between the variance request and the city's proposed street widening project. App. at F-2; App. at A-3. On appeal, the California Court of Appeal for the Fourth District, Division Three, affirmed the decision in an unpublished opinion. The California Supreme Court denied review on July 10, 1986. App. at B-3.

Although the state trial court issued the peremptory writ forbidding the city from imposing the condition, the inverse condemnation claim for compensation was reserved for trial. App. at A-4; App. at F-3. However, because California law at that time did not allow damages for a regulatory taking (*see Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979), *aff'd on other grounds*, 447 U.S. 255

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[3] Moore also sought a declaration that Article 22, Section 13-316 of the city's Municipal Code was unconstitutional on its face. This section requires land dedication as a condition to granting a building permit where the master plan calls for additional property for street widening. The ordinance was found facially valid by the state trial court and this ruling is not in issue here. *See* App. at E-2.

(1980)) Moore did not attempt to set a trial date and secure his compensation through the state court.[4] Instead, on February 20, 1987, Moore filed this suit in federal court under 42 U.S.C. § 1983 alleging his rights were violated under the Fifth and Fourteenth Amendments of the United States Constitution. 28 U.S.C. § 1331(1) (jurisdiction of District Court).

Moore alleged that the City of Costa Mesa denied him his right to use and develop his property free of unreasonable restrictions or conditions. App. at C-3. Moore alleged that the imposition of the unlawful dedication requirements, although invalidated after more than two years of litigation, entitled him to recover interim damages. The results of the state court proceedings were

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[4] Moore's taking claim in federal court is in compliance with this Court's ripeness doctrine established in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172. Under that decision, a claimant must have a final decision from the local agency and must pursue available state compensation remedies before a claim in federal court is ripe. There is no question that Moore had secured a final decision regarding the dedication requirement attached to the zoning variance. *See* Footnote 3, *infra*. On the state compensation requirement, *Williamson County* requires pursuing reasonable, certain, and adequate state procedures that "exist at the time of the taking." *Id.* at 194. In Moore's case, at the time of the taking and when Moore filed his action in federal court, there was not a procedure available in California for seeking compensation for a regulatory taking. The sole remedy was to seek declaratory relief or mandamus to invalidate the regulation. *Agins v. City of Tiburon*, 24 Cal. 3d 266. In an identical situation, the Ninth Circuit Court of Appeals has properly recognized that a claim for compensation in federal court is ripe. *Hoehne v. County of San Benito*, 870 F.2d 529, 533-34 (9th Cir. 1989).

alleged as well as the California law precluding Moore from recovering interim damages for a regulatory taking and limiting his state remedies to mandamus relief invalidating the dedication requirement. App. at C-4-5.

Since Moore was pursuing his damages in federal court, the state court on September 7, 1988, issued a ruling abating and staying the state court action pending resolution of the compensation claim in the federal courts. App. at D.[5]

The Ninth Circuit has now ruled that Moore's complaint failed to state a valid claim for which compensation is available. Despite the fact that "the California courts determine[d] that the conditional variance invaded Moore's property rights" (App. A-9), the court nevertheless ruled that a compensable takings claim had not been stated because Moore had not been denied all economically viable use of the property.

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[5] Given the procedural posture of the damages issue, the prior state court action does not present a res judicata issue. The Ninth Circuit in the opinion below correctly explained:

> "The Superior Court of California did not decide whether Moore was entitled to compensation for the alleged temporary taking. Instead, after the court ordered the writ, found that the Code section was not unconstitutional, and awarded attorney's fees and costs, it stated '[a]ll other issues reserved for trial.'
>
> "On appeal, the City conceded at oral argument that res judicata does not apply to the facts of this case." App. A-4 n.2.

The Ninth Circuit's reasoning initially recognizes that under this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255, a land use regulation effects a taking if it does not substantially advance legitimate state interests, *or* denies the owner economically viable use of the land. App. at A-5 (citing *Agins*, 447 U.S. at 260). The first prong of the *Agins* formulation was applied by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where it was held that a condition attached to the issuance of a development permit effected a taking because the condition did not substantially advance the state interests claimed to justify the exaction. Moore's case is like *Nollan*. In both cases a development permit was conditioned by a requirement for land dedication (*Nollan*: public access easement; *Moore*: street widening dedication) which was found to be invalid because the exaction was not sufficiently related to the impacts of the proposed use.

Despite the obvious parallels between *Moore* and *Nollan*, and despite the fact that the California courts had already ruled the city's land dedication requirement to be unlawful regulation, the Ninth Circuit held that Moore had not stated a claim for relief and would not have an opportunity to attempt to prove his damages at trial.

The Ninth Circuit's reasoning was based on the fact that Moore's complaint did not allege that he was denied substantially all economically viable use of the property. App. at A-7. The Court of Appeals interpreted this Court's ruling in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), as authorizing interim damages for temporary takings only in cases where it is alleged, as was done in *First Church*,

that all use of the property is denied. App. at A-8. Since Moore's temporary taking claim was based on an invalid condition attached to a zoning variance request, the court ruled that this invasion of property rights did not state a claim for interim damages.

The Court of Appeals correctly notes that "in *Nollan* the [Supreme] Court did not decide whether damages could be recovered for the time a conditional coastal development permit was in effect. The Court merely declared invalid the conditional permit, which required a public easement across a beach before a new house could be constructed." App. at A-9.

That issue is now squarely presented in this case.

REASONS FOR GRANTING REVIEW

I

THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

As the Ninth Circuit explained, this Court has not resolved whether interim damages are available for a temporary taking based on the first prong of the *Agins* formulation. *Nollan* did not present that issue since the plaintiff there did not pursue damages. *Nollan*, 483 U.S. at 828.

Similarly, the decision in *First Church* does not address whether interim damages are available when a land use regulation is found to constitute a taking on the ground that the regulation fails to substantially advance

legitimate state interests. The decision in *First Church*, although seeming to set forth a broad constitutional rule requiring compensation whenever a regulatory action results in a taking, expressly limits its holding to the facts presented where the ordinance denied the owner all use of the property. *First Church*, 482 U.S. at 321. *First Church* therefore established that temporary taking claims based on the second prong of *Agins* are maintainable, but left open the question of whether interim damages can be recovered when the regulatory action is found to constitute a taking based on the first prong of *Agins*.

This issue is of national significance and should be resolved by this Court. The temporary taking question has been of special interest to this Court, having attempted to reach the issue on four separate occasions prior to *First Church*.[6] The Court now has an opportunity to complete its task and resolve whether interim damages are available for all temporary takings (*i.e.*, first and second prong takings) or whether the compensation remedy applies only for takings alleging temporary denial of all economically viable use.

The considerations which supported granting review in *First Church* apply equally to this case. Like *First Church*, the property owner here is being limited to seeking invalidation of the regulatory action through a mandamus proceeding and is being denied an opportunity to attempt to prove damages at trial. Whether or not interim damages are available is of critical importance to land use

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[6] *Agins*, 447 U.S. 255; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340; *Williamson County*, 473 U.S. 172; *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

regulators who must know the extent of potential liability when enacting land use regulations. Similarly, property owners responding to regulatory actions must be informed of the dimensions of the constitutional protection afforded by the Just Compensation Clause.

II

THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS

As explained above, the Ninth Circuit decision precludes recovery for interim damages based on regulatory actions which fail to substantially advance legitimate government interests under the first prong of *Agins*. The Ninth Circuit decision limits the holding in *First Church* to situations where the property owner alleges that the regulation denies all use of the property. The decision below is in direct conflict with other Circuit Court of Appeals decisions.

For example, the decision below is in direct conflict with the decisions by the Fifth and Eleventh Circuits. In *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981) (*Wheeler I*), the Fifth Circuit held that an arbitrary prohibition on the construction of an apartment building effected a taking. *Id.* at 100. Even though the property could have been used to construct a different type of building, *i.e.*, alternative uses of the property were available, this fact was irrelevant to the takings claim based on the arbitrary deprivation of the right to use and develop the property in a lawful manner. Although the restriction was invalidated, the Eleventh Circuit nevertheless recognized in *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437 (11th Cir.

1984) (*Wheeler II*), that a compensable temporary taking occurred during the time the restriction was in effect. *Wheeler II*, 746 F.2d at 1440-41. In *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987) (*Wheeler III*), the Court reaffirmed that interim damages were available under *First English*. *Id.* at 270; *see also A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1487-88 (11th Cir. 1988); *Poirier v. Grand Blanc Township*, 167 Mich. App. 770, 423 N.W.2d 351 (Mich. App. 1988) (allowing temporary taking damages for wrongful rezoning even though original zoning was restored and use of the property was never precluded).

In contrast with the decision below, the *Wheeler* decisions recognize that a temporary taking requiring compensation for interim damages can be stated as a result of arbitrary land use restrictions even though alternative uses may exist for the property. The opinion below rejects, as a matter of law, petitioner's ability to go forward to prove his claim on the identical takings theory.[7]

The decision below also conflicts with decisions from within the same circuit. In *Sederquist v. City of Tiburon*, 765 F.2d 756 (9th Cir. 1984), the property owners challenged a regulation imposing conditions on their ability

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[7] Adding further to the conflict among the various circuits is the Third Circuit's decision in *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988). Like the *Moore* decision now on petition for certiorari, the court in *Bello* interpreted *First Church* as authorizing temporary taking damages only when all economic use of the property is denied. *Bello*, 840 F.2d at 1131.

to file applications for property development. The Ninth Circuit stated:

> "By facially challenging these conditions the landowners may be able to establish a taking. In *Agins*, the Supreme Court identified two means by which a 'taking' may occur.
>
> . . . .
>
> "Consistent with the first prong, a 'use restriction on real property may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose.' . . . [A]ssuming the law as applied to the factual findings made at trial show the conditions imposed are illegal under California law, those conditions are not 'reasonably necessary' to advance those interests. If the landowners can establish that situation, the City may have 'taken' the landowners' property." *Sederquist*, 765 F.2d at 761 (citations omitted).

Similarly, *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986), authorizes inverse condemnation claims based on government actions which unreasonably delay property development. *Id.* at 1145. The plaintiff here should likewise have an opportunity to show that the unreasonable delay caused by imposition of an illegal dedication requirement was compensable.

CONCLUSION

Whether the Just Compensation Clause requires interim compensatory damages for temporary takings which occur as a result of regulatory actions which fail to substantially advance legitimate state interests is an issue

of critical importance to property owners and land use regulators. The federal courts are split as to how to resolve this issue.

Under the Ninth Circuit's decision, a property owner can be subjected to years of delay and consequent damage due to regulatory action that does not further a legitimate state interest. Ultimately, the property owner may prevail in having the regulatory action ruled invalid, but under the decision below, will be told there is no compensation remedy and that the sole recourse is invalidation.

Of course, *First Church* was necessarily limited to the facts of that case where the property owner allegedly was deprived of all use. The question presented here is whether a compensation remedy is required where the taking claim is based upon failure of the regulatory action to substantially advance a legitimate state interest. The present case should now be reviewed to allow the Court to answer this question which was left unresolved in *First Church*.

DATED: April, 1990.

Respectfully submitted,

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APPENDIX

APPENDIX AA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY A. MOORE, Plaintiff-Appellant, v. CITY OF COSTA MESA, et al., Defendants-Appellees.	)	No. 87-6432 D.C. No. CV87-1125MRP ORDER (Filed Jan. 9, 1990)

Before: HALL and LEAVY, Circuit Judges, and GEORGE,* District Judge

The panel has voted to deny the petition for rehearing. Judges Hall and Leavy have voted to reject the suggestion for rehearing en banc, and Judge George has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable Lloyd D. George, United States District Judge, District of Nevada, sitting by designation.

APPENDIX A

Gary A. MOORE, Plaintiff-Appellant,

v.

CITY OF COSTA MESA, et al., Defendants-Appellees.

No. 87-6432.

United States Court of Appeals, Ninth Circuit.

Argued Aug. 3, 1988.

Submitted Aug. 26, 1988.

Decided Sept. 26, 1989.

Terry M. Moshenko, Newport Beach, Cal., for plaintiff-appellant.

Richard Booth and Larry T. Pleiss, Madory, Booth, Zell and Pleiss, Tustin, Cal., for defendants-appellees.

Appeal from the United States district court for the Central District of California.

Before HALL and LEAVY, Circuit Judges, and GEORGE*, District Judge.

LEAVY, Circuit Judge:

OVERVIEW

The appellant Gary Moore (Moore) claims that a conditional variance requiring part of his property to be deeded to the City of Costa Mesa (the City) was a partial

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*The Honorable Lloyd D. George, United States District Judge for the District of Nevada, sitting by designation.

temporary taking in violation of the fifth amendment, for which he is owed compensation. The conditional variance ultimately was declared invalid by the California courts.

We affirm the decision of the district court that the conditional variance was not a violation of the takings clause for which compensation is owed.

FACTS

Moore owns two adjacent lots, each containing a house, on Wilson Street in Costa Mesa. Moore lives in one of the houses and runs his carpet installation business out of the other. In 1983, Moore requested a zoning variance from the city so he could construct a large commercial building on the two lots.

The City's master plan called for proposed widening of Wilson Street. The City granted Moore the zoning variance, but with the condition that he deed to the City that part of his land needed for the proposed widening project. The condition was part of a City policy[1] for proposed developments that would increase traffic on a street slated for widening. Approximately ten percent of Moore's entire parcel was needed for the proposed widening.

Moore unsuccessfully appealed the conditional variance to the Costa Mesa Planning Commission and to the City Council. He filed a petition for a writ of mandamus and a complaint for declaratory relief and damages

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[1] Costa Mesa Municipal Code, Article 22, Section 13-316, Street Dedications.

against the City in Orange County Superior Court. Moore requested: (1) the condition be set aside, (2) a declaration that the condition was unconstitutional, (3) damages for inverse condemnation, and (4) general damages and attorney's fees. The court granted Moore mandamus and declaratory relief, finding the evidence insufficient to support any relationship between the proposed widening project and the expansion of Moore's business premises. The court issued a peremptory writ forbidding the City to impose the condition. However, the Superior Court specifically found that the City's policy was not unconstitutional on its face. The Court of Appeals affirmed the decision and the California Supreme Court denied review.

In 1987, Moore sued in federal court under 42 U.S.C. § 1983, alleging his rights were violated under the takings clause of the fifth amendment and the equal protection clause of the fourteenth amendment, as well as his substantive and due process rights under the fourteenth amendment. Moore claimed the three year delay from 1983 to 1986 in obtaining a building permit was an unconstitutional temporary taking of his property, thereby entitling him to damages and attorney's fees and costs. The city moved to dismiss the complaint for failure to state a claim upon which relief can be granted under Federal Rules of Civil Procedure 12(b)(6).

The district court dismissed Moore's complaint with prejudice. The court *sua sponte* applied res judicata to Moore's claims, finding that he had presented a claim for money damages to the state court, and that the state court had rendered judgment adversely to Moore on that issue. Alternatively, the district court found that Moore had

failed to state a claim for a taking without compensation in violation of the fifth amendment. A motion for reconsideration was denied, and Moore appealed. On appeal, Moore argues only the takings claim.[2]

DISCUSSION

Standard of Review

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir.1984). Review is limited to the contents of the complaint. *Id.* A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir.1985), *cert. denied*, 474 U.S. 1056, 106 S.Ct. 795, 88 L.Ed.2d 773 (1986).

Motions to dismiss for failure to state a claim must be viewed with particular skepticism in cases involving

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[2] The Superior Court of California did not decide whether Moore was entitled to compensation for the alleged temporary taking. Instead, after the court ordered the writ, found that the Code section was not unconstitutional, and awarded attorney's fees and costs, it stated "[a]ll other issues reserved for trial."

On appeal, the City conceded at oral argument that res judicata does not apply to the facts of this case. Therefore, we need not address the district court's application of this doctrine.

claims of inverse condemnation. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1478 (9th Cir.1989) (citing *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir.1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988)).

Whether Moore's Complaint States a Claim for Compensation

The fifth amendment guarantees that private property shall not "be taken for public use without just compensation." *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). It is established doctrine that " 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' " *First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922)). A taking may be found without any physical invasion where " 'a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of property. . . . ' " *Martino v. Santa Clara Water Dist.*, 703 F.2d 1141, 1147 (9th Cir.), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983) (quoting *Richmond Elks' Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir.1977)). The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner the economically viable use of his land. *Agins*, 447 U.S. at 260, 100 S.Ct. at 2141 (citations omitted).

The governmental action that results in a taking of property necessarily implicates the " 'constitutional obligation to pay just compensation.' " *First Evangelical*, 482 U.S. at 315, 107 S.Ct. at 2386 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)). The Supreme Court recently has held that compensation must be paid for the temporary regulatory taking of all of a person's property, until the time the regulation is invalidated by the courts. *First Evangelical*, 482 U.S. at 321, 107 S.Ct. at 2383, 2389.

However, not all regulatory invasions of property rights amount to unconstitutional takings. *See Martino*, 703 F.2d at 1146 (distinguishing regulations that invade property rights from unconstitutional takings). A regulation that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496, 498, 107 S.Ct. 1232, 1248, 1249, 94 L.Ed.2d 472 (1987) (requirement that 27 million tons of coal not be mined is not a taking when this amount represents only 2% of owners' coal), *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296-97, 101 S.Ct. 2352, 2370-71, 69 L.Ed.2d 1 (1981) (mere enactment of regulatory statute not a taking because it does not categorically deny surface mining and does not regulate alternative uses to which the lands may be put), *see also Agins*, 447 U.S. at 260, 100 S.Ct. at 2141 (1980) (whether there is an unconstitutional taking depends on whether ordinance does not substantially advance legitimate state interests, or denies an owner the economically viable use of his land), *Citizens Ass'n of Portland v. International Raceways, Inc.*, 833 F.2d 760, 762 (1987) (whether

there is an unconstitutional taking depends on whether the owner has been deprived of his property's economically viable use). Further, "[m]ere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' " *Agins*, 447 U.S. at 263 n.9, 100 S.Ct. at 2143 n. 9 (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed. 240 (1939)), *accord First Evangelical*, 107 S.Ct. at 2388. Finally, loss of anticipated gains or future profits is not usually sufficient to constitute a taking. *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979).

In his complaint, Moore alleges he suffered damages during the time the conditional variance was imposed, because "the costs of development and construction of the improvements contemplated . . . has increased substantially in value and Moore has suffered additional losses due to lack of ability to use the Subject Property during said period." Complaint at 5, para. 16. Moore claims damages in excess of $25,000. It is significant that there are no allegations that all Moore's property was taken, or that he was denied all or substantially all of its economically viable use, or that there was an unreasonable delay in the decision-making process.

Despite Moore's citations to the recent Supreme Court and Ninth Circuit decisions in *First Evangelical* and *Martino*, these cases do not support Moore's claim that his inability to develop his property constituted an unconstitutional regulatory taking for which compensation must be paid. In *First Evangelical*, an interim ordinance prohibited the construction or reconstruction of buildings

for the church's retreat center, which had been destroyed by a flood. 482 U.S. at 307, 107 S.Ct. at 2381-82. The complaint alleged that the interim ordinance "denies all use of [the property]." 482 U.S. at 308, 107 S.Ct. at 2384. The Court decided that compensation must be paid for the time the interim ordinance was in effect because it denied *all* use of property. 482 U.S. at 321, 107 S.Ct. at 2389. The Court explicitly did not extend its holding to cases like Moore's: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.*

Like *First Evangelical*, this circuit's decision in *Martino* also involved allegations that the landowners had been deprived of all of their property's reasonable economic uses, by ordinances requiring permits and dedications for a flood control project before any development could occur. The complaint alleged that the Martinos' property "has been deprived of all of its reasonable beneficial economic uses and its economic return and marketability. . . . " 703 F.2d at 1144. We reversed the district court's grant of summary judgment to the Santa Clara Valley Water District, finding that the complaint alleged facts which, if true, could constitute a taking. *Id.* at 1142.

Unlike the regulations in *First Evangelical* and *Martino*, the conditional variance at issue here affected only a small portion of Moore's property. Moore does not allege that his ongoing carpet contracting business was in any way adversely affected by the conditional variance. Thus, he does not allege he was deprived of substantially all

reasonable use of his property. While the California courts determine that the conditional variance invaded Moore's property rights, this was not an "invasion" of sufficient magnitude to have denied Moore the "justice and fairness" guaranteed by the fifth and fourteenth amendments. *See Martino*, 703 F.2d at 1146.

The Supreme Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), also does not support Moore's position. As Moore concedes, in *Nollan* the Court did not decide whether damages could be recovered for the time a conditional coastal development permit was in effect. The Court merely declared invalid the conditional permit, which required a public easement across a beach before a new house could be constructed. 107 S.Ct. at 3148-50.

Consequently, even taking all Moore's allegations as true, construing them in the light most favorable to him, and viewing the dismissal with skepticism, it appears beyond doubt that Moore can prove no set of facts in support of his claim which would entitle him to relief. His allegations are insufficient to state a claim for unconstitutional regulatory taking for which compensation is due, and there is no case law that supports his position. The district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim was proper.

AFFIRMED.

APPENDIX B

Gary MOORE, Plaintiff,

v.

CITY OF COSTA MESA, et al., Defendants.

No. CV-87-1125 MRP.

United States District Court, C.D. California.

Aug. 26, 1987.

Hugh R. Coffin, Pizer & Michaelson, Inc., Santa Ana, Cal., for plaintiff.

Larry T. Pleiss, Madory, Booth, Zell & Pleiss, Tustin, Cal., for defendants.

AMENDED MEMORANDUM OF DECISION

PFAELZER, District Judge.

This Court heard oral argument on plaintiff Gary Moore's motion for a new trial on August 10, 1987. Having read the papers submitted and considered the arguments contained therein, the Court denies plaintiff's motion.

I. *Facts*

Plaintiff Gary Moore owns two adjacent lost within the defendant City of Costa Mesa. At present, there are houses on each of the two lots.[1] Moore lives in one house,

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[1] The record does not reflect whether Moore has torn down the houses and begun to construct his office (continued)

and used the other for his carpet installation business. In late 1983, Moore requested zoning variances to build a large commercial building, with both warehouses and office space, on the two lots. Moore's lots front on Wilson Street in Costa Mesa. The city's master plan calls for the eventual widening of Wilson Street. The city granted Moore his zoning variance and permits on the condition that he deed over to the city the land necessary for the widening of Wilson Street. This land represented just over ten percent of Moore's entire parcel. The city required this condition as part of a stated policy covering situations in which a proposed new development would increase traffic on a street that needed widening. Moore unsuccessfully appealed to the Costa Mesa Planning Commission and to the City Council. On May 21, 1984, having exhausted his administrative remedies, Moore sued the city in Orange County Superior Court requesting (1) mandamus to set aside the condition; (2) declaratory relief that the condition was invalid; (3) damages for inverse condemnation; and (4) general damages and attorney's fees. The Superior Court, which reviews zoning decisions under a "substantial evidence" standard, granted Moore mandamus and declaratory relief. It held that the city's policy was not reasonably related to the relatively small projected increase in traffic from the new building. Moore states that he decided to abandon his claims for damages in the Superior Court, although he

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building. However, it is clear that the parties do not dispute that Moore had the use of the houses for the entire period of the alleged taking, from 1983 until 1986.

never filed any formal document to that effect. The Court of Appeals, in an unpublished decision, affirmed the Superior Court ruling on a 2-1 vote, with the dissenting judge voting to uphold the city's policy. On July 10, 1986, the Supreme Court of California denied review, with Justice Reynoso dissenting.

On February 20, 1987, Moore filed suit in this Court under 42 U.S.C. § 1983. Although he was awarded declaratory relief in the state courts, he claims that the delay in obtaining his permit from 1983 to 1986 constituted an unconstitutional temporary taking of his property, entitling him to monetary damages. He alleges that the delay violated his rights under the Taking Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and his rights to both substantive and procedural due process under the Fourteenth Amendment.[2] Defendants are the City of Costa Mesa, the City Council of Costa Mesa, and ten unnamed Doe defendants.

This Court heard oral argument on June 22, 1987 on defendants' motion to dismiss Moore's complaint. The Court entered judgment dismissing Moore's complaint with prejudice on July 6, 1987, on the grounds that it was barred by res judicata and that it failed to state a claim.

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[2] Moore's other constitutional claims only state a cause of action to the extent that his taking claim states a cause of action. As discussed below, the Supreme Court has written a number of opinions in recent years dealing with similar claims, and has always discussed the problem in terms of the takings clause. The parties' arguments and analysis in connection with this motion framed the issues solely in terms of the takings clause.

On July 16, 1987, Moore timely filed a motion for a new trial under Fed.R.Civ.P. 59, which in this context is essentially the equivalent of a motion for reconsideration.

II. *Statute of Limitations*

The statute of limitations in California for § 1983 actions is one year. *See Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). The parties dispute whether the longer, pre-*Wilson* statute of limitations should apply to this action, but the dispute is immaterial. Moore's deprivation, if any, continued until his relief in state court was final, on July 10, 1986. This suit was filed less than one year later, and was therefore timely even under *Wilson*. Even if Moore's cause of action somehow accrued earlier, his state suit on the same facts tolled the statute. *See, e.g., Valenzuela v. Kraft Inc.*, 801 F.2d 1170 (9th Cir.1986), *modified*, 815 F.2d 570 (1987); *Bollinger v. National Fire Ins. Co.*, 25 Cal.2d 399, 154 P.2d 399 (1944).

III. *Res Judicata*

Although the parties did not argue the issue of res judicata in the motion to dismiss, the Court raised the issue sua sponte. *See McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir.1986). Defendants have relied on this issue in their opposition to the motion now before the Court. The parties agree that Moore originally made a claim for damages on these same facts before the state court, and that this claim was based on essentially the same legal theory now advanced in this Court. Moore states that he decided to abandon this claim for damages before the state court on the authority of *Agins v. City of Tiburon*,

24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). *Agins*, in a portion of the opinion which was not reviewed by the U.S. Supreme Court, held that money damages are not available as a remedy for overly restrictive zoning. This portion of *Agins* was recently overruled in *First English Evangelical Lutheran Church v. County of Los Angeles*, ___ U.S. ___, 107 S.Ct. 2378, 2387-89, 96 L.Ed.2d 250 (1987). *First Church* held that even a "temporary taking" between the enactment and judicial invalidation of an overly-restrictive land use ordinance could be compensable under the Fifth Amendment. *See id.*

Res judicata bars relitigation in federal court of any state court judgment to the same extent that the state would bar relitigation. *See Heath v. Cleary*, 708 F.2d 1376, 1379 (9th Cir.1983), 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4469 (1981). Moore argues that in light of *Agins*, pressing his claim for money damages in state court would have been futile. However, Moore cites no cases in support of a "futility" exception to the principle of res judicata. Generally, a change in controlling law will not provide an exception to res judicata. *See Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398-401, 101 S.Ct. 2424, 2427-29, 69 L.Ed.2d 103 (1981); *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1503-04 (11th Cir.1984), *cert. denied*, 469 U.S. 1191, 105 S.Ct. 966, 83 L.Ed.2d 970 (1985); *In re Tennessee Central Ry. Co.*, 498 F.2d 904, 906 (6th Cir.1974). In any case, Moore's claim for damages was not necessarily futile. If he had been unsuccessful in the Superior Court, he could have pressed his claim on appeal, and, if unsuccessful,

petitioned for certiorari to the United States Supreme Court. This is exactly what happened in *First Church.*

Under California law, res judicata applies not only to those claims actually litigated in a prior proceeding, but also to those which could have been litigated as part of that cause of action. The case of *Hatch v. Bank of America,* 182 Cal.App.2d 206, 5 Cal.Rptr. 875 (1960) is instructive. In that case, the plaintiff successfully brought suit to obtain possession of a truck. In a later suit, the plaintiff sought damages for use of the truck during the period of its conversion. The Court dismissed the second suit as barred by res judicata on the ground that the same fundamental set of facts had been presented in the first action. The Ninth Circuit has expressly applied this rule in cases like this one where the plaintiff first brings a state court action for mandamus, and later seeks damages in the federal courts. In *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 786 (9th Cir.1986), the court held the fact that the plaintiff abandoned his claim for damages in state court did not negate the binding effect of that judgment as res judicata. Claim preclusion applied wherever, as here, there is an identity of facts with those in a previous action. *See McClain*, 793 F.2d at 1033. The fact that a plaintiff requests a different type of relief, or even presents a different legal theory, does not negate or lessen the binding effect of the previous state court judgment.[3]

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[3] To the extent that Moore argues that the state court judgment was in error, the lower federal courts do (continued)

Therefore, the Court holds that Moore's claim for damages under § 1983 is barred by the res judicata effect of his state court judgment.

IV. *The Merits*

In the alternative, the Court holds that Moore has failed to state a claim for taking without just compensation in violation of the Fifth Amendment.[4] *First Church* has changed the landscape somewhat in the area of takings law. *See also, Nollan v. California Coastal Comm'n*, ___ U.S. ___, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

In *First Church*, a flash-flood wiped out a campground belonging to the church. The County Council then passed an ordinance totally barring any construction where the flood had occurred. The church sued for damages, claiming that this ordinance effected a taking of its property, which was entirely within this floodplain. The state court dismissed the damage claim, holding that

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not sit as courts of appeal for state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *cf. Pennzoil Co. v. Texaco, Inc.*, ___ U.S. ___, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). To the extent that he argues that the application of res judicata leaves a wrong without a remedy, this contention is incorrect. Moore effectively waived his remedy by not pursuing it in the state court proceeding.

[4] The Fifth Amendment is applied to the states by the Fourteenth Amendment. *Chicago, B. & Q.R.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

even if the ordinance was invalid, such a temporary taking (from the time of enactment until the judicial invalidation of the ordinance) was not compensable in money damages, on the authority of the Supreme Court of California in *Agins*. The United States Supreme Court overruled, holding that a total government ban on the use of a property, even if temporary in duration, could constitute a "taking"for the purpose of the Fifth Amendment, and must be monetarily compensated. *See First Church*, 107 S.Ct. at 2387-88; *see also Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir.) (same), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983).

First Church is like this case in that it involves government overregulation of temporary duration.[5] However, *First Church* is unlike this case in that it involved a complete taking of the property at issue. In *First Church*, the appellant was completely unable to use its campground as a result of the ordinance at issue. *Martino* likewise involved a situation in which there had been a complete taking; the landowners in that case were completely unable to use two undeveloped lots across which the local water district planned to route a floodway. *See* 703 F.2d at 1143-44.[6] In contrast, in this case, Moore has

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[5] Defendants do not contest that Moore has exhausted all of the remedies available to him under state law. *Compare MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[6] In *Martino*, the property at issue " 'had[d] been deprived of all of its reasonable beneficial economic uses and its economic return and marketability,' " 703 F.2d at 1144.

been able to continue to use his property for his home and business; he has merely been unable to build a new and more profitable building to replace the current buildings.[7]

Moore argues in response that he city's action did constitute a total taking of the strip of his land nearest Wilson Street. However, as the Supreme Court stated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether . . . a taking [has occurred], this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole[.]" *See id.* at 130-31, 98 S.Ct. at 2662; *see also Keystone Bituminous Coal Ass'n. v. DeBenedictis*, ___ U.S. ___, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472 (1987); *Andrus v. Allard*, 444 U.S 51, 65-66, 100 S.Ct. 318, 326-27, 62 L.Ed.2d 210 (1979). The proper focus is on Moore's entire parcel of land, and it is clear that the city's condition did not constitute a taking of Moore's entire parcel.

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[7] At oral argument on the motion to dismiss, Moore contended that the City's action had effectively denied him all use of his property during the pendency of his state court lawsuit. After the Court pointed out that the complaint and the record of the state court action (which Moore appended to the complaint) revealed that this was not so, Moore conceded at the motion for a new trial that he had had use of the two houses during the period at issue.

Moore does not allege any actual physical invasion of his property; rather, he alleges a regulatory taking. *Compare Loretto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).[8] It is settled that government regulation does not constitute a taking merely because it affects the value of a property. *See Agins*, 447 U.S. at 263 n.9, 100 S.Ct. at 2143 n. 9; *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed. 240 (1939).[9] Regulation only constitutes a taking if it " 'denies an owner economically viable use of his land' " or if it " 'interfere[s] with reasonable investment backed expectations' " in that use. *DeBenedictis*, 107 S.Ct. at 1247 (citations omitted) (holding that Pennsylvania's anti-subsidance act limiting the operation of coal mines

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[8] *Nollan*, 107 S.Ct. 3141, like this case, involved a governmental body's attempt to acquire an easement over part of a parcel of real estate in return for permitting the landowners to develop the remainder of the parcel. Also like this case, the governmental body's condition of development was not reasonably related to the burdens imposed by the new development, and as a result constituted an unconstitutional taking unless the owners were paid just compensation. However, the landowners in *Nollan* did not assert that they were entitled to damages for the period of time prior to the invalidation of the ordinance, and the Supreme Court did not indicate that they were entitled to such damages. The Court held only that the permanent imposition of the condition at issue would constitute a taking without just compensation, *id.* at 3146-48. In any case, without the requested building permits, the landowners in *Nollan* were apparently deprived of any use of the property (the only building on the property had become uninhabitable), unlike Moore in this case. *Id.* at 3143.

[9] Were this not the case, not only would all zoning ordinances constitute takings, so too would government decisions concerning spending, taxation, and money supply, all of which can and do affect the value of real estate.

did not effect a taking).[10] The appellant in *First Church* successfully pled this; Moore has not and cannot. He pleads that the expense of building his improvements increased during the delay and that he lost the use of the improvements for the period of the delay. These losses do not rise to the level of an unconstitutional taking. *See DeBenedictis*, 107 S.Ct. at 1247. Therefore, Moore's complaint fails to state a claim and his motion for a new trial must be denied.

IT IS THEREFORE ORDERED that plaintiff's motion for a new trial is denied.

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[10] The standards applied in *DeBenedictis* are well-settled law. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

APPENDIX C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY L. MOORE, Plaintiff, -vs- CITY OF COSTA MESA, a municipal corporation, THE CITY COUNCIL OF THE CITY OF COSTA MESA, and DOES I through X, Inclusive, Defendants,	CIVIL CASE NO. CV 87-1125 MRP (TX) COMPLAINT FOR DEPRIVATION OF CIVIL RIGHTS, DENIAL OF EQUAL PROTECTION OF THE LAW, DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW (CIVIL RIGHTS) (Filed Feb. 20, 1987)

Plaintiff, GARY L. MOORE ("MOORE") alleges as follows:

1. This action arises under the Civil Rights Act of 1871, 42 U.S.C. Section 1983 as hereinafter more fully appears. This Court has jurisdiction over this matter under 42 U.S.C. Section 1983 and 1988 and 28 U.S.C. Sections 1331 and 1343.

2. This is a Civil Action in which Plaintiff, GARY L. MOORE, seeks damages against Defendants CITY OF COSTA MESA, and CITY COUNCIL OF THE CITY OF COSTA MESA (hereinafter collectively referred to as "CITY") for deprivations of MOORE's rights, privileges and immunities under the First, Fifth and Fourteenth Amendments of the United States Constitution.

3. At all times relevant herein, MOORE was, and now is, a citizen of the United States and a resident of the County of Orange, California.

4. At all times mentioned herein, Defendant CITY was, and now is, a municipal corporation organized and existing under the laws of the State of California.

5. MOORE owns certain real property located in the City of Costa Mesa, with a common street address of 221 and 225 West Wilson Street, Costa Mesa, California, and identified as Assessor Parcel Numbers AP 419-012-25 and 419-012-26 (hereinafter collectively "Subject Property").

6. The CITY COUNCIL of the CITY OF COSTA MESA at all times mentioned herein has been and now is a legislative body of the CITY OF COSTA MESA, and at all times mentioned herein has been, and now is, charged under the provisions of the Municipal Code of the CITY OF COSTA MESA as the body to hear appeals and make final administrative decisions and determinations in regard to applications for conditional use permits and interpretation of the provisions of the planning, zoning and development provisions of the Municipal Code of the City of Costa Mesa.

7. On or about February 21, 1984, the CITY COUNCIL OF THE CITY OF COSTA MESA considered the appeal of MOORE in regard to an application for a conditional use permit to improve the Subject Property. On or about February 24, 1984, the City Clerk of the CITY mailed to MOORE a notice of the decision of the CITY COUNCIL of the CITY in regard to MOORE's application.

8. The decision of the CITY COUNCIL of the CITY was invalid as to MOORE, and the CITY COUNCIL abused its discretion and denied MOORE his rights, privileges and immunities secured by the First, Fifth and Fourteenth Amendments of the United States Constitution to own, use and develop property free from unreasonable restrictions or conditions as to the use or development of the subject property. The conditions imposed by the CITY COUNCIL of the CITY for development of the subject property included the requirement, as a pre-condition for development, for an unlawful dedication of more than ten percent (10%) of the land area of the Subject Property and MOORE, furthermore, was required to re-design his project and the layout of the structures to be improved on the Subject Property to comply with additional requirements of the CITY. The CITY COUNCIL of the CITY, furthermore, unreasonably and unlawfully restricted the uses of the Subject Property beyond that which is lawful and otherwise damaged MOORE's interest in and right to the reasonable use and development of the Subject Property.

9. On May 21, 1984, MOORE filed a petition for Writ of Mandamus and Complaint for Declaratory Relief and Damages in the Superior Court of the State of California,

in and for the County of Orange, denominated as Case No. 42 99 35.

10. The Honorable Judith M. Ryan, Judge of the Superior Court of the State of California for the County of Orange, ordered that a Writ of Mandamus issue and a Writ issued in this case on or about November 15, 1984. The terms of the Writ are contained in a true and correct copy of the Peremptory Writ of Mandamus which is attached hereto, marked Exhibit "A" and incorporated herein by this reference.

11. Thereafter, CITY appealed the decision of the trial court to the Court of Appeal of the State of California, which affirmed the decision of the trial court by an opinion filed March 24, 1986. A true and correct copy of said opinion is attached hereto, marked Exhibit "B" and incorporated herein by this reference.

12. Thereafter, CITY petitioned the Court of Appeal for rehearing, which was denied April 11, 1986.

13. Thereafter, CITY petitioned the California Supreme Court for review, which petition was denied July 20, 1986. A true and correct copy of the denial of the petition for review by the California Supreme Court is attached hereto, marked Exhibit "C" and incorporated herein by this reference.

14. MOORE is informed and believes and thereon alleges that the law of the State of California is such that it will not permit MOORE to recover interim damages for the loss of use and the ability to reasonably develop the Subject Property between the date of the unreasonable restriction and the date the restriction is ended, under the

laws of the State of California and the United States in that the decision by the California Supreme Court in *Agins v. Tiburon* (1979), 24 Cal. 3d 266; 157 Cal. Rptr. 372, limits the ability of MOORE in State Court to an action in mandamus and for recovery of costs only and MOORE may not recover damages or attorneys fees, and the only remedy available to MOORE is a federal action.

15. The conduct of the CITY constituted a judicially determined overregulation of the use of the Subject property in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution. This conduct was established by the trial court and affirmed by the Court of Appeal of the State of California.

16. As a direct, consequential and proximate result of the conduct of the CITY, MOORE has suffered damages in the inability to use his property for the period of time between the first imposition of the restriction in the case of the Subject Property and the date the restriction is ended, during which period of time the cost of development and construction of the improvements contemplated by MOORE has increased substantially in value and MOORE has suffered additional losses due to lack of ability to use the Subject Property during said period.

17. As a result of said conduct, MOORE has been damaged in an amount in excess of $25,000.00, and will be established according to proof. Said conduct of the CITY constituted taking of property of MOORE without due process of law in violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution.

18. As a result of said conduct, MOORE has been damaged in an amount in excess of $25,000.00, and will be established according to proof. Said conduct of the CITY constituted "denial of equal protection of the law" for "due process" in violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution.

19. MOORE has been required to retain an attorney to protect his interests and MOORE is entitled to recovery of attorneys fees under 42 U.S.C. Section 1988.

WHEREFORE, MOORE respectfully requests the following relief:

1. For compensatory damages in an amount of in excess of $25,000.00, according to proof;

2. For attorneys fees pursuant to 42 U.S.C. Section 1988;

3. That MOORE recover his costs of suit incurred herein;

4. And for such other and further relief as the Court deems just and proper.

Dated: February 20, 1987.

PIZER & MICHAELSON INC.

By /s/ Hugh R. Coffin
HUGH R. COFFIN
Attorneys for Plaintiff

APPENDIX D

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

GARY L. MOORE, Plaintiff,	) CASE NO. 42 99 35
vs.	) NOTICE
CITY OF COSTA MESA, et al.,	) OF RULING
Defendants.	) DATE: September 7, 1988) TIME: 9:30 A.M.) DEPT: 25) TRIAL: None Pending

TO ALL PARTIES HEREIN AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 7, 1988, the motion of defendant, CITY OF COSTA MESA, to abate the State court proceedings in Orange County Superior Court, Case No. 42 99 35, came on regularly for hearing in Department 25 of the above-entitled court

before the Honorable William F. McDonald, Judge, presiding. Mark A. Birmingham of Madory, Booth, Zell and Pleiss appeared on behalf of defendant and moving party, CITY OF COSTA MESA.

After due consideration of the matter, the Court granted said motion and thereby ordered that all State court proceedings in the above-captioned action, Orange County Superior Court Case No. 42 99 35, are forthwith abated and stayed pending final resolution of the Appeal presently pending in the United States Court of Appeal Ninth Circuit, Appeal No. 87-6432, entitled *Gary Moore v. City of Costa Mesa.*

DATED: September 8, 1988

MADORY, BOOTH, ZELL and PLEISS
A Professional Corporation

By LARRY T. PLEISS
LARRY T. PLEISS
Attorneys for Defendant
CITY OF COSTA MESA

APPENDIX E

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GARY L. MOORE, Plaintiff and Respondent. v. CITY OF COSTA MESA, Defendant and Appellant.	G002071 (Super. Ct. No. 42-99-35) OPINION

APPEAL from a judgment of the Superior Court of Orange County. Judith M. Ryan, Judge. Affirmed.

Thomas C. Wood, City Attorney, and Eleanor M. Frey, Assistant City Attorney, for Defendant and Appellant.

Pizer & Michaelson, Inc., and Hugh R. Coffin for Plaintiff and Respondent.

May a city require a landowner to dedicate a portion of his land for street widening as a condition of granting a conditional use permit? Yes, but only if substantial evidence exists showing a reasonable relationship between the landowner's proposed use and the dedication requirement.

Moore owns two adjoining lost, containing 12,862 square feet with a 107 foot frontage, on Wilson Street in the City of Costa Mesa ("the City"). Wilson Street is currently 40 feet wide curb-to-curb in 60 foot

right-of-way. The City's Master Plan of Highways shows that Wilson Street will eventually be widened to a 70 foot street in an 84 foot right-of-way.

On streets where the Master Plan requires additional property for street widening. Costa Mesa Municipal Code Section 13-316 requires land dedication for street widening as a condition to granting a building permit over $2,000.[1] In applying section 13-316, the City's Planning District analyzes the proposed development to determine the vehicle traffic it will generate. If the proposed development increases traffic flow, the dedication requirement is imposed. If not, the requirement is waived, or the developer may seek a variance.

Moore's lots are zoned C1. local business district. Commercial properties abut Wilson Street on both sides. A medium density condominium complex is behind the lots. At present, two older houses are on the lots; Moore lives in one and uses the other as an office and storage facility for his carpet installation business, under a conditional use permit ("CUP"). (Carpet contracting is not a permitted use under C1 zoning, but maybe allowed under a conditional use permit.)

In late 1983, Moore requested zoning variances for a permit to build a 6.621 square-foot building on the two lots: a 3,528 square foot warehouse with 3,028 of office space on a second floor. He also requested a new CUP to allow his business to occupy the proposed building. In

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[1] At the trial level, Moore challenged the constitutionality of section 13-316. The court found the section to be constitutional on its face. Moore did not appeal this decision and we do not address it here.

analyzing Moore's variances requests, the Planning District used the City's General Plan Traffic Study to determine the anticipated traffic load which a typical 6,621 square foot C1 building would generate. The Staff estimated that Moore's building would generate 230 "trip-ends" (vehicle arrivals or departures). 191 more trip-ends than the estimate for the current structures. The Staff recommended denying Moore's requested variance from the dedication requirement since Moore's development would create an estimated 600% increase in traffic at the site.

After holding public hearings in January 1984, the City's Planning Commission granted Moore's building permit and CUP, but denied the variance from the dedication provision which required Moore to dedicate the 12 foot Wilson Street frontage to complete the 84 foot right-of-way. The dedication area, 1,308 square feet, is 10.17% of the lots' total area.

Moore appealed from the Commission's decision to the Costa Mesa City Council. The Council held a public hearing in February 1984 and granted the permits subject to the same conditions.

Moore petitioned the superior court for an administrative writ of mandamus, challenging the dedication requirement's validity. (Code Civ. Proc., § 1094.5) The court granted the writ, finding the evidence in the record insufficient to establish a reasonable relationship between the dedication requirement and Moore's proposed development. The City now appeals.

This appeal's primary issue is the sufficiency of the evidence on the dedication's reasonableness. It is now

well-established that a governmental body may require dedication as a condition for property development as long as the dedication is reasonably related to the requested use. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 639 et seq.; *Ayres v. City Council of City of Los Angeles* (1949) 34 Cal.2d 31, 41-42; *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 627-628; Gov. Code, § 65909.) The question before us is threefold: (1) whether substantial evidence supported the City's finding that Moore's project would increase traffic; (2) whether the dedication is reasonably related to the traffic increase; and (3) who decides (1) and (2). We will consider these questions in reverse order.

The City has the statutory authority to control land use planning. (Gov. Code, §§ 65000 et seq.; *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 880-881.) When an administrative decision does not involve any fundamental vested right, the trial court should only review the administrative record to determine whether the findings are supported by substantial evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144.) The Planning Commission's dedication requirement does not involve any fundamental vested right. Acquisition of a vested right to construct a building requires (1) a building permit, and (2) substantial expenditures in reliance on the permit. (*Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 864.) Moore has no inherent vested right to a use permit; development of land is a privilege, not a right. (See *Sommers v. City of Los Angeles* (1967) 254 Cal.App.2d 605, 620.)

Therefore, the trial court's review was limited to examining the administrative record to insure that the

City's decisions were supported by substantial evidence. On appeal, our review is identical. (*Bixby v. Pierno, supra,* 4 Cal.3d at p. 149.) We may not weigh the evidence in the administrative record (*Hingsbergen v. State Personnel Board* (1966) 240 Cal.App.2d 914, 916-917), and we must indulge all reasonable inferences supporting the City's decision. (*Sommers v. City of Los Angeles, supra,* 254 Cal.App.2d at p. 610.) It is Moore's burden to show that the City abused its discretion, that is, that the evidence is insufficient to support the City's decision. (*Bringle v. Board of Supervisors* (1960) 54 Cal. 2d 86, 89.)

Moore failed to show the evidence insufficient to support the City's finding regarding the projected traffic increase. The main evidence before the City and trial court was the Planning District projection that Moore's development would generate 191 additional trip-ends. This projection was based upon a traffic study prepared for the City by independent professional urban planners. Moore presented no evidence that the study was unreliable or incorrect. He merely asserted that it did not accurately predict his specific business' traffic potential. The relevant concern, however, is the *building's potential for traffic generation, not Moore's* potential for traffic generation as its tenant. For planning to be at all effective, the City must consider the reasonably anticipated future demands which a project will place upon the traffic system. (See *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31, 41.)

Nevertheless, the trial court did not err in finding no reasonable relationship between the projected traffic increase and the dedication. A dedication is reasonable if it will help fulfill public needs emanating directly from the

proposed use. (*Ayres v. City Council of Los Angeles, supra,* 34 Cal.2d at p. 42; *Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412, 421-422.) We fail to see any direct, reasonable relationship between an increase of 191 trip-ends (95.5 cars) per day and a public need for street widening. Even indulging all reasonable inferences in the City's favor, this small traffic increase does not, by itself, justify the dedication. We recognize that a developer may be required to contribute to the cost of an eventual public need by forced dedication even if the individual development alone does not create the need, but the projected need and the dedication must be reasonably related to the proposed development. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek, supra,* 4 Cal.3d at pp. 637-640; *Remmenga v. California Coastal Commission, supra,* 163 Cal.App.3d 623, 628-630.) A city may consider the incremental effect of a single project in evaluating that project's impact on the entire traffic system. Nevertheless, the single project must contribute to the public need in a way which makes the actual dedication reasonable. Otherwise, any incremental increase in traffic from a proposed development, however small, could trigger a forced dedication for street widening. "An arbitrarily conceived exaction will be nullified as a disguised attempt to take private property for public use without resort to eminent domain . . . . [Citations.]" (*Scrutton v. County of Sacramento, supra,* 275 Cal.App.2d at p. 421.) We agree with Moore and the trial court that the projected increase of 191 trip-ends, while theoretically related to the eventual need for street widening, was not reasonably related to the forced dedication in this case.

The judgment and writ of mandamus are affirmed.

NOT TO BE PUBLISHED

Trotter/s/
TROTTER, P.J.

I concur:

Sonenshine/s/
SONENSHINE, J.
Crosby, J., dissenting.

I dissent. Although this project would not create an immediate need to widen Wilson Street, it was lawful for the city to consider the cumulative impact of future development to exact the dedication of the easement in exchange for the conditional use permit. (*Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31; *Associated Homebuilders, etc., Inc. v. Walnut Creek* (1971) 4 Cal.3d 633.) The burden on the land represented by the easement would be very slight until the future development occurs and the land is actually utilized: The city is willing to allow it to be used for parking or landscaping in the meantime. When the street is improved, respondent's property will share in that benefit.

95 additional car trips a day do not seem many; but if only four new businesses on respondent's side of street and five more on the other were to generate similar numbers, the city would be faced with a *thousand* more trips a day from this one block. Multiplied by perhaps dozens of similar blocks, the congestion might approach the gridlock conditions now common on many local streets. After the fact the city will find it difficult or impossible to improve the street in this post-Proposition 13 era; for then it may be widened only by condemning a

great deal of improved property, possibly including some of the new buildings themselves.

The majority's holding is clearly against the trend of current case law. (See, e.g., *Paoli v. California Coastal Com.* (Feb. 21, 1986, A028421) ___ Cal.App.3d ___; *Nollan v. California Coastal Com.* (Feb. 18, 1986, B004663) ___ Cal. App. 3d ___; *Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148; *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623.) It will also, if applied in other cases, seriously hamper Costa Mesa's efforts to plan for the future of all its citizens, including respondent whose property must someday lose much of its value when it looks out upon a parking lot anachronistically named "Wilson Street."

I would reverse.

Crosby, J.

APPENDIX F

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

GARY L. MOORE, Plaintiff & Petitioner, vs. THE CITY OF COSTA MESA, etc., et al., Defendants & Respondents.	)	CASE NO. 42 99 35 JUDGMENT ON PETITION FOR WRIT OF MANDAMUS (Filed Nov 13, 1984)

This cause came on regularly for hearing on Notice of Petitioner's Application for Writ of Mandamus on August 28, 1984 at 9:30 a.m. in Department 22 of the above-entitled court, the Honorable Judith M. Ryan, Judge Presiding, sitting without a jury. Petitioner appeared by his attorney, Hugh R. Coffin of Pizer & Michaelson Inc. Respondents appeared by their attorney, Eleanor M. Weaver, Assistant City Attorney of the City of Costa Mesa. The Court received the entire Administrative Record in this cause, heard argument of counsel and the matter having been submitted for decision,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. There is insufficient evidence in the Record to support the imposition of Condition No. 11 (the condition which requires dedication of additional right of way for the widening of West Wilson Street) as a condition to approval of Petitioner's Application, designated as ZE-83-169;

2. Specifically, the Court finds that there is insufficient evidence as to the "relationship between the exaction and the proposed use." *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31, 207 P.2d 1;

3. A Peremptory Writ of Mandate shall be issued and directed to Respondent, City of Costa Mesa, and the City Council of the City of Costa Mesa commanding Respondents, and each of them, immediately after receipt of the Writ to set aside the decision made by Respondent, City Council, on February 21, 1984 insofar as it imposes condition No. 11 of approval requiring Petitioner to dedicate all land 42' south of the center line of West Wilson Street to the City of Cost Mesa;

4. The Writ shall further command Respondents to reconsider the matter in light of this Judgment and the findings contained herein;

5. The Court does not find that the Costa Mesa Municipal Code, Article 22, Section 13-316 Street Dedications is unconstitutional on its face;

6. Petitioner shall have and recover from Respondent the sum of $1,500.00 as and for attorney's fees pursuant to §800 of the California Government Code;

7. Petitioner's request for attorney's fees pursuant to California Code of Civil Procedure §1021.5 is denied;

8. Petitioner shall have and recover from Respondent Petitioner's costs and disbursements in this proceeding for preparation of the Administrative Record, filing fees and related court costs in the sum of $469.15.

All other issues reserved for trial.

Dated: Nov 6 1984

/s/ Judith M. Ryan
JUDGE OF THE
SUPERIOR COURT